

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**In RE:**

**LIBOR-BASED  
FINANCIAL INSTRUMENTS  
LITIGATION**

**11-MD-2262**

**MDL 2262**

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Re: *Maxwell Van De Velde v. Bank of America, et al.*, Case No. 11-cv-6120-GBD, transfer to this Court pending

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**MEMORANDUM IN SUPPORT OF MOTION OF SHAPIRO HABER & URMY LLP  
AND SHEPHERD, FINKELMAN, MILLER & SHAH LLP FOR APPOINTMENT AS  
CO-LEAD COUNSEL FOR *INDIRECT* PURCHASER CLASS**

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Pursuant to this Court's Order of August 22, 2011, Shapiro Haber & Urmey LLP ("Shapiro") and Shepherd, Finkelman, Miller & Shah LLP ("Shepherd"), co-counsel in the action *Maxwell Van De Velde v. Bank of America, et al.*, Case No. 11-cv-6120-GDB (complaint attached hereto as Ex. A; assignment to this Court as related matter pending) respectfully seek appointment as interim co-lead counsel to represent a putative class of *indirect* purchasers in these consolidated antitrust actions.

**I. APPOINTMENT OF SEPARATE COUNSEL TO REPRESENT INDIRECT PURCHASERS IS REQUIRED IN CLASS ACTIONS ARISING FROM VIOLATIONS OF ANTITRUST LAW.**

As courts throughout the United States routinely recognize, and as many of the experienced antitrust practitioners who have filed actions in this multi-district litigation have argued, appointment of separate counsel to represent indirect purchasers in putative class actions

involving unfair competition and antitrust claims is necessary because claims by indirect purchasers:

“present an entirely separate level of evidence and proof as compared to direct purchaser claims.” *See, e.g., In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 281 (D. Mass 2004). Given the differing evidence and proof required, direct and indirect purchasers may have different interests on issues such as class certification and the amount of damages.

Memorandum in Support of Plaintiffs’ Motion to Modify Practice and Procedure Order No. 2, Dkt 272, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 06-MD-1775 (Feb. 8, 2007) (“*Air Cargo*”); *motion granted*, Practice and Procedure Order No. 4, *Air Cargo*, Dkt 299 (appointing four firms as co-lead counsel for indirect purchasers).<sup>1</sup> *See also In re Androgel Antitrust Litigation (No. II)*, 1:09-md-02084-TWT (N.D. Ga.) (Shepherd appointed co-lead counsel of indirect purchaser class); *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 4:07-md-01819-CW (N.D. Cal.) (Shepherd appointed the Steering Committee for indirect purchaser class); *In re Optical Disk Drive Products Antitrust Litigation*, 10-md-2143-VRW, MDL 2143, Dkt 96 (N.D. Cal. June 4, 2010) (appointing separate counsel for the indirect purchaser class); *In re Polyurethane Foam Antitrust Litig.*, 1:10-md-02196-JZ, Dkt 28 (N.D. Ohio Jan. 28, 2011) (same). Appointment of separate counsel for indirect purchasers also is consonant with *In re Literary Works in Elec. Databases Copyright Litig.*, 05-5943-CV (L) (2d Cir. Aug. 17, 2011), in which the Second Circuit reversed the district court’s approval of a class-wide settlement which had been negotiated over a period of several years because class members with differing claims were not represented by independent subclass counsel. *See id.* at 21-24.

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<sup>1</sup> Appointment of separate counsel for indirect purchasers in multi-district litigation became appropriate following the passage of the Class Action Fairness Act, Pub. L. 109-4, 28 U.S.C. § 1332, which effectively mandated that indirect purchaser class actions, which previously would have been litigated in state court, would be removed to federal court and included in multi-district litigation alongside Section 1 Sherman Act claims.

**II. SHAPIRO HABER & URMY LLP AND SHEPHERD, FINKELMAN, MILLER & SHAH LLP ARE WELL QUALIFIED TO SERVE AS INTERIM CO-LEAD COUNSEL OF THE PUTATIVE INDIRECT PURCHASER SUBCLASS.**

Both Shapiro and Shepherd are experienced class action firms with significant expertise in both antitrust and securities class actions, and thus are well qualified to serve as interim co-lead counsel for the putative indirect purchasers.<sup>2</sup> See Firm Resume of Shapiro, attached as Ex. B; Firm Resume of Shepherd, attached as Ex. C. The nature of the allegations in these consolidated actions render it likely that there will complex litigation involving the proper scope and relationship of various antitrust and securities laws. This heightens the need for counsel with both robust antitrust practices and sophisticated securities law capabilities.

Both Shapiro and Shepherd possess these qualifications. Charles Tompkins of Shapiro currently is co-lead counsel in *In re Plasma Derivative Protein Therapies Antitrust Litig.*, 09-cv-07666 (N.D. Ill.), and Vice-Chair of the Executive Committee in *In re Marine Products Antitrust Litig.*, No. 10-cv-2319 (C.D. Cal.). Shapiro also represents one of the largest mattress licensers

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<sup>2</sup> We are informed that, while Shepherd and Shapiro have reached an agreed-upon structure for interim leadership of the putative *indirect* class, there may be competing applications for appointment as interim lead or co-lead counsel for the *direct* purchaser class. We take no position with regard to these applications. Both Shapiro and Shepherd have worked effectively and efficiently with many of the competing direct lead counsel applicants, and we are confident that we could and would do so again here, regardless of which firm(s) are selected. See, e.g., *In re Androgel Antitrust Litig.*, No. 1:09-md-2084-TWT, MDL No. 2084 (N.D. Ga.) (Shepherd is co-lead counsel for the indirect class, while Linda Nussbaum of Grant & Eisenhoffer is lead counsel for the direct class); *In re Plasma Derivative Protein Therapies Antitrust Litig.*, 09-cv-07666 (N.D. Ill.) (Shapiro and Cohen Milstein, Sellers & Toll PLLC are co-lead counsel for the direct purchaser class); *Dearman, et al. v. Gillette Co.*, (D. Mass.) (Robbins Geller and Shapiro achieved a significant settlement for the class as court-appointed lead and liaison counsel, respectively); *In re SRAM Antitrust Litig.*, No. 4:07-md-01819-CW (N.D. Cal.) (Shepherd appointed as member of indirect purchaser class steering committee including, *inter alia*, Cotchett Pitre & McCarthy LLP; Hagens Berman Shapiro & Sobol LLP; and Gold Bennett Cera and Sidener LLP; *Oliver, et al. v. SD-3C LLC, et al.*, No. 11-cv-01260-JCS (N.D. Cal.) (Shapiro is assisting Susman Godfrey LLP in the prosecution of this class action).

and manufacturers in the United States in *In re Polyurethane Foam Antitrust Litig.*, MDL No. 2196 (N.D. Ohio). Mr. Tompkins also was a member of the trial team that litigated *Pease, et al. v. Jasper Wyman & Son, et al.*, a price-fixing action in which the plaintiff class obtained a \$54 million judgment following one of the relatively few jury trials of an antitrust class action in recent memory. Shapiro's securities experience is similarly extensive, including appointments as co-chair of the Plaintiffs' Executive Committee in *In re Merrill Lynch Analyst Reports Sec. Litig.*, 02-md-1484 (S.D.N.Y.) (settled for \$125 million), and a role as co-lead counsel in *In re HealthSouth Corp. Shareholders Litig.*, an ongoing derivatives litigation in which the firm has secured settlements in excess of \$100 million against some Defendants and a verdict of \$2.8 billion against another. *See also* Ex. B.

Shepherd's resume is similarly impressive. The firm currently is serving on the Steering Committee for co-lead counsel in *In re SRAM Antitrust Litig.*, No. 4:07-md-01819-CW (N.D. Cal.), representing 27 state classes of indirect purchasers of SRAM. That case settled in early 2011, on the eve of trial and after significant pre-trial preparation and coordination with counsel for Direct Purchasers. Shepherd also serves as co-lead counsel for the Indirect Purchaser Class in *In re Androgel Antitrust Litig.*, MDL No. 2084, No. 1:09-MD-2084-TWT (N.D. Ga.). The firm also actively litigates securities fraud and shareholder derivative claims on behalf of shareholders and other clients, and, among its recent appointments, has served as sole or lead counsel in the following cases: *Engstrom v. Elan Corp., plc, et al.*, No. 11-cv-1232-SAS (S.D.N.Y.) (on-going securities fraud action); *Phones Plus, Inc. v. Hartford Life Ins. Co. and Neuberger Berman Mgmt., LLC*, No. 3:06-cv-1835-AVC (D. Conn.) (challenging industry-wide practice of "revenue sharing" as a violation of ERISA); *In re Faro Techs. Sec. Litig.*, No. 6:05-cv-1810-ACC-DAB (M.D. Fla.) (securities fraud involving violations of the FCPA); and *In re*

*Sara Lee Corp. Sec. Litig.*, No. 03-cv-3202 (N.D. Ill.) (securities fraud class action). Shepherd's experience with RICO is also extensive. Currently, Shepherd is serving as co-lead counsel of a certified class in *Miller, et al. v. Basic Research, et al.*, No. 2:07-cv-00871 (D. Utah), which asserts RICO claims. *See also* Ex. C.

### III. CONCLUSION

For the reasons set forth above, Shapiro Haber & Urmy LLP and Shepherd, Finkelman, Miller & Shah LLP jointly request appointment as interim co-lead counsel for the indirect purchaser class.

Dated: September 1, 2011

Respectfully submitted,

s/ Patrick A. Klingman

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Counsel for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on September 1, 2011, I filed the foregoing with the Clerk of Court using the Court's CM/ECF System which will send notification of such filing to all counsel of record.

s/ Patrick A. Klingman

Patrick A. Klingman (PK-3658)